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# COURT OF APPEALS

ATTORNEYS - DISCIPLINARY PROCEEDINGS - MISCONDUCT - RECIPROCAL PROCEEDINGS - MARYLAND RULES 16-609 & 16-773 - MARYLAND RULES OF PROFESSIONAL CONDUCT 1.15(a), (b), and (c) AND 8.4(c) and (d)

Facts: This is a reciprocal discipline action arising out of disciplinary proceedings initiated in the District of Columbia, where the Respondent Diane Cafferty ("Cafferty"), a member of that Bar and the Maryland Bar, practiced law. Cafferty was disbarred from the practice of law in the District of Columbia when the District of Columbia Court of Appeals determined that she violated various District of Columbia Bar Standards. Maryland Bar Counsel, on behalf of the Attorney Grievance Commission, filed in the Court of Appeals a petition for disciplinary action against Cafferty for reciprocal discipline. Based on the District of Columbia order disbaring Respondent, Bar Counsel alleged, under Maryland Rule 16-773, violations of the Maryland Rules of Professional Conduct ("MRPC"), including violations of MRPC 1.15(a), (b), and (c) and 8.4(c) and (d), and Maryland Rule 16-609.

From late 1991, and continuing through mid-1996, Cafferty personally wrote numerous checks on her law firm's escrow account that were made out to cash, in amounts ranging from \$50.00 to \$7,615.06. Cafferty wrote checks on the escrow account, made out to cash, when she knew about requests from the condominium association clients for accountings. Cafferty also wrote checks transferring funds from the escrow account to the firm's operating account even though she knew that the escrow account contained client trust funds. Cafferty failed to render accountings promptly to her condominium association client upon request. She attended meetings of the condominium association, including one in February 1994, and many of the written requests for accountings were addressed to her. Hence, Cafferty was aware of the requests for accountings, but made no effort to see that they were rendered in a timely fashion. By mid-1996, when the condominium association client sought disbursement of approximately \$40,000.00 in client trust funds, less than \$2,000.00 remained in the firm's escrow account.

Based on Cafferty's conduct, the District of Columbia Court of Appeals concluded that Cafferty had recklessly misappropriated client trust funds through her "conscious indifference."

Held: Disbarred in Maryland. Cafferty's conduct, which violated various District of Columbia Bar Standards, also violated MRPC 1.15(a), (b), and (c) (Safekeeping Property) and 8.4(c) and (d) (Misconduct), as well as Maryland Rule 16-609 (Prohibited Transactions). The factual findings and legal conclusions of the

District of Columbia Court of Appeals, under Maryland Rule 16-773, were conclusive evidence of misconduct under Maryland's Standards for attorneys admitted to practice in Maryland. Respondent's "conscious indifference" in the use and management of the client trust account constituted intentional misappropriation under Maryland law. Respondent's acts of misappropriation fell into what Maryland cases have determined to be "intentional" behavior sanctionable by disbarment.

Attorney Grievance Commission v. Diane E. Cafferty, AG No. 82, September Term, 2002, filed September, , 2003. Opinion by Harrell, J.

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CIVIL PROCEDURE - DECLARATORY JUDGMENT ACTION - A TRIAL COURT MAY NOT DISMISS AN ACTION FOR DECLARATORY JUDGMENT AND THEN DECLARE THE RIGHTS OF THE PARTIES. ONCE A COURT DISMISSES THE ACTION, THERE IS NOTHING THEN PENDING, AND THE COURT IS WITHOUT AUTHORITY TO ISSUE AN ORDER WITH RESPECT TO THE MATTER.

CONTRACT LAW - AMBIGUITY OF TERMS - THE TRIAL COURT'S INTERPRETATION OF THE LANGUAGE OF THE LEASE WAS ERRONEOUS, AS A MATTER OF LAW. THE LANDLORD'S VIEW THAT THE LANGUAGE OF THE LEASE, GIVING THE LANDLORD THE "RIGHT TO LIMIT" THE NUMBER OF REDUCED-FEE EMPLOYEE PARKING SPACES, EQUATED TO A "RIGHT TO ELIMINATE" ALL SUCH SPACES, WAS CONTRARY TO THE ORDINARY MEANING OF THE TERM "LIMIT." BECAUSE THE TERM "LIMIT" WAS AMBIGUOUS, HOWEVER, THE CASE WAS REMANDED TO THE TRIAL COURT TO DETERMINE THE PARTIES' INTENT AT THE TIME OF CONTRACT FORMATION.

Facts: Petitioner operates a retail lingerie shop. Petitioner entered into a ten-year lease for retail space in a shopping center. Respondent purchased the plaza and assumed the lease with petitioner. Article XL of the lease provided, in relevant part: "Tenant shall pay to Landlord \$30.00 per month for each employee parking space as is needed for its employees at the Premises. . . . Landlord reserves the right to limit the number of employee parking spaces to be provided Tenant pursuant to this Article."

Respondent subsequently refused petitioner's requests for reduced-fee parking spaces, citing its right in the contract to limit

the number of reduced-fee spaces. After first charging petitioner higher monthly charges for parking, respondent later notified petitioner that it would cancel petitioner's monthly parking agreement, and that the only parking available to petitioner's employees would be daily parking at a cost of \$8 per day.

Petitioner brought suit against respondent under the Maryland Uniform Declaratory Judgments Act, Maryland Code (1973, 1998 Repl. Vol., 2001 Cum. Supp.), § 3-406 of the Courts and Judicial Proceedings Article, seeking a construction of Article XL of the lease, and a declaration requiring respondent to supply a minimum of ten reduced-fee spaces to petitioner. Petitioner also sought damages. Respondent filed a motion to dismiss. The trial court granted respondent's motion. Declaring the language of the lease unambiguous, the trial court stated that respondent's "right to limit" the number of spaces, permitted respondent to reduce the number to zero.

Petitioner noted a timely appeal to the Court of Special Appeals. That court affirmed, holding, *inter alia*, that the trial court did not err in granting the motion.

Held: Reversed. The Court of Appeals held that the language of the lease providing respondent the "right to limit" the number of reduced-fee parking spaces did not permit it to eliminate the reduced-fee parking entirely.

With regard to the contract interpretation, the Court reaffirmed its adherence to the law of objective contract interpretation. Reviewing several definitions of the term "limit," the Court found that the word incorporates the concept of a boundary or restraint. To limit something is to define its extent, and in so doing, to quantify it. The respondent's suggestion that the concept of elimination is contained within the term limit conflicts with this idea that a limit defines an area or range. The Court found, however, that the language of the contract revealed no evidence as to what limit, short of elimination, was appropriate. Therefore, the Court directed that the case be remanded to the trial court to determine the parties' intent at the time of contract formation.

The Court of Appeals reiterated that dismissal of the declaratory judgment action and at the same time declaring the rights of the parties is improper. The Court of Special Appeals upheld the trial court's dismissal on the ground that the trial court, at the hearing on the motion, declared the rights of the parties. Disagreeing with this determination, the Court of Appeals pointed out that a trial court may not dismiss an action and then declare the rights of the parties. Once a court dismisses an entire action, there is nothing then pending, and the court is without authority to issue an order with respect to the matter.

Sy-Lene of Washington, Inc. v. Starwood Urban Retail II, LLC, No.

132, September Term, 2002, filed July 29, 2003. Opinion by Raker, J.

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CIVIL PROCEDURE - RES JUDICATA - USE OF SUBSTANTIVE DEFENSE IN FIRST ACTION AS BASIS FOR CLAIM IN SUBSEQUENT ACTION BY DEFENDANT.

Facts: Appellant financed a car purchase by entering into a retail installment contract with appellee. When appellant subsequently fell behind in her monthly payments, appellee repossessed the car, but failed to provide appellant with the post-repossession written notice information required by Md. Code, §12-1021(e) of the Commercial Law Article. Resale of the car by appellee left a deficiency on the total installment contract amount owed (including cost of sale), and appellee sued to collect the deficiency. Appellant claimed in defense, that, because of the statutory violation, appellee was limited to recovering only the principal amount of the loan. The trial court found the appellee violated §12-1021(e) and held that appellant was not liable to appellee for the deficiency. In a subsequent action, appellant sued for damages incurred as a result of the appellee's violation of §12-1021(e). Appellee moved to dismiss this subsequent action on the ground of res judicata. The trial court granted appellee's motion to dismiss, and the Court of Appeals granted *certiorari* prior to proceedings in the Court of Special Appeals.

Held: Reversed. Maryland has a permissive counterclaim rule. A defendant may file a counterclaim during the original action, but failure to do so does not necessarily preclude him from subsequently maintaining a separate action on that claim. A counterclaim in the original action is mandatory only when the counterclaim is required to be interposed by a statute or rule of court, or when successful prosecution of the second action would nullify or impair the rights established in the initial action. Appellant did not seek to re-litigate any issue settled in the original action. She simply wanted to use the facts, as established in the first action, to obtain affirmative relief in a second action. Because the permissive counterclaim rule is based on the principle that a civil defendant should be able to bring suit at a time and place of his own selection, and because successful prosecution of appellant's claim against appellee would not nullify the judgment entered in favor of appellee in the original trial, appellant's suit against appellee is not precluded from going forward.

Agnes Moore v. Nissan Motor Acceptance Corporation, et al., No. 96, September Term, 2002, filed August 27, 2003. Opinion by Wilner, J.

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CRIMINAL LAW - REMOVAL OF CASES - CRIMINAL LAW - CAPITAL CASE - VENUE - Once a defendant exercises the Maryland Constitutional automatic right of removal in a capital case and the case is removed properly to another court having jurisdiction, the receiving court is vested with complete authority over that case and subsequent events, such as a withdrawal of a death notice, do not destroy that court's jurisdiction or reinvest jurisdiction in the court in which the action was previously pending.

CRIMINAL LAW - REMOVAL OF CASES - CRIMINAL LAW - NON-CAPITAL CASE - The Circuit Court for Charles County properly denied appellant's request to have the case transferred back to Prince George's County following the State's withdrawal of the intention to seek the death penalty. The court did not abuse its discretion in denying a subsequent suggestion of removal when appellant did not establish that he could not receive a fair and impartial trial in that county.

CRIMINAL LAW - EVIDENCE - WITNESSES - The Circuit Court did not abuse its discretion in limiting cross-examination of a key State witness about alleged prior misconduct pursuant to Maryland Rule 5-608(b). The trial court was justified in concluding that the proponent of the inquiry had not established a reasonable factual basis that the alleged conduct actually occurred because mere accusations of prior misconduct, with no factual support, are not probative of a witness' untruthfulness.

CRIMINAL LAW - EVIDENCE - WITNESSES - The Circuit Court did not abuse its discretion by excluding extrinsic evidence offered to prove prior misconduct of a witness. The proffered evidence was, at best, relevant only to the witness' character trait for truth and veracity, rather than to bias or motive to lie, and therefore was inadmissible under Maryland Rule 5-608(b).

Facts: Appellant Dean James Pantazes was convicted in the Circuit Court for Charles County, Maryland, of first degree premeditated murder and other charges relating to the murder of his wife, Clara Pantazes. He was indicted in Prince George's County, and

the State filed a notice of intent to seek the death penalty. Appellant exercised his Maryland Constitutional right to automatic removal pursuant to Article IV, § 8 of the Maryland Constitution and Maryland Rule 4-254(b)(1). He was tried and convicted on all counts before a jury in Charles County. Prior to sentencing, the State withdrew the notice of intent to seek the death penalty. The trial court sentenced appellant to life without the possibility of parole. Appellant then noted a timely appeal to the Court of Special Appeals, which reversed his conviction and remanded the case for a new trial in the Circuit Court for Charles County. See *Pantazes v. State*, 141 Md. App. 422, 785 A.2d 865, cert. denied, 368 Md. 241, 792 A.2d 1178 (2002).

In May 2002, prior to the second trial, appellant moved to have the case remanded to Prince George's County. The trial court denied the motion.

At trial, the State sought to prove that appellant hired a prostitute, Jermel Chambers, to murder Mrs. Pantazes. In her testimony, Chambers recounted that appellant, who identified himself as Steve, paid her for sexual services and hired her to kill his boss' wife. In early 2000, appellant paid Chambers \$5000.00 to commit the murder and promised her an additional \$5000.00 upon completion. On March 30, 2000, appellant picked up Chambers and drove her to his home in Upper Marlboro, Maryland. Appellant took her into the garage and told her the gun was in a towel on the refrigerator. Before leaving, appellant instructed Chambers to make the murder look like a robbery. Appellant then left Chambers in the garage with the door closed. When Mrs. Pantazes came into the garage, Chambers shot her three times, took her jewelry and purse, and drove away in her car. Chambers pled guilty to murder and testified for the State in exchange for the State not seeking the death penalty.

The State called Kim Young to corroborate Chambers' testimony. Young also met appellant in early 2000. Appellant identified himself as Steve and asked Young to commit a murder. Appellant proposed a murder that resembled closely the actual murder of Mrs. Pantazes. Appellant told Young that he would leave the garage door open, that Young should arrive at the house around 9:00 - 9:30 a.m. when the victim would be leaving for work, that there would be a gun hidden in the garage, and that Young should make the murder look like a robbery. When Young heard about Mrs. Pantazes' murder on the television news, Young relayed the information about appellant's proposed murder to the police.

Prior to Young's cross-examination, appellant moved *in limine* to introduce evidence before the jury of Young's alleged prior misconduct that did not result in a conviction. During a hearing outside the presence of the jury, appellant argued, pursuant to Maryland Rule 5-608(b), he could question Young about involvement in



a 1995 incident that resulted in the death of a District of Columbia police officer and in which Young allegedly lied about the identity of the killer. He argued that, pursuant to Maryland Rules 5-616(b)(2) and 5-616(b)(3), he could introduce extrinsic testimony about the 1995 incident because the conduct related to bias and motive to lie in the present case. In support of his motion, appellant offered two affidavits, one from the officer who investigated the 1995 incident and one from appellant's private investigator. He argued that these affidavits established a reasonable factual basis that Young actually was involved in the 1995 robbery-turned-murder and that Young lied in making an identification. The trial judge denied appellant's motion, thereby limiting Young's cross-examination and excluding extrinsic evidence. The trial court found Rule 5-608(b), not 5-616, to be applicable. During Young's cross-examination, appellant renewed his request to cross-examine Young about the 1995 incident and to introduce extrinsic evidence regarding it. The court again denied the request.

Following the trial, the jury convicted appellant on all counts, and the court sentenced him to life without the possibility of parole. Appellant noted a timely appeal to the Court of Special Appeals. The Court of Appeals granted certiorari prior to consideration by the intermediate appellate court to consider whether the trial court properly denied appellant's second suggestion of removal and whether the trial court abused its discretion in its evidentiary rulings.

Held: The Court of Appeals affirmed and held that the trial court did not abuse its discretion by denying the suggestion of removal, limiting cross-examination of Young, and excluding extrinsic evidence.

The Court first addressed appellant's removal argument that, because the State withdrew the death notice, the case should revert back to Prince George's County—the county where the crime occurred. The Court observed that in a capital case, a party may obtain automatic removal only once; after that, a party must establish that a fair and impartial trial cannot be obtained. The decision whether to remove a case falls within the sound discretion of the trial court. Appellant made no effort to meet that standard; therefore, the trial court did not abuse its discretion by denying appellant's second suggestion of removal. Furthermore, the Court reasoned, the State's withdrawal of the notice of intent to seek the death penalty did not *reinvest* jurisdiction in Prince George's County. After the initial removal, venue was proper in Charles County and that court had complete control and authority over the case; its jurisdiction was not destroyed by the State's action. Finally, the Court noted that, even if appellant had met his burden, the right of removal does not include the right to choose the new venue.

The Court next addressed Rule 5-608(b) and whether the trial court properly limited Young's cross-examination. Rule 5-608(b)

permits any witness to be cross-examined about his or her prior acts not evidenced by a criminal conviction that are probative of untruthfulness. It represents an exception to the general prohibition against using evidence of character to show propensity. This exception, however, is carefully limited to avoid dangers such as undue consumption of trial time, confusion of the issues, and unfair surprise. The Rule requires, first, that a trial judge find the alleged conduct relevant, i.e., probative of truthfulness. Second, upon objection, a questioner must establish a reasonable factual basis for asserting that the conduct occurred. Third, the questioner is bound by the witness' answer and may not prove the conduct through extrinsic evidence. Finally, as with all evidence, the court must determine, under Rule 5-403, whether the probative value of the inquiry is outweighed by unfair prejudice. The Court observed that the Rule provides no specific guidance as to what constitutes a "reasonable factual basis" but remarked that a hearsay allegation of guilt is not sufficient. Reviewing the procedure conducted by the trial court, the Court noted that the trial court properly held a hearing outside the presence of the jury and that it was within the court's discretion to determine whether appellant had, in fact, established a reasonable factual basis. The proffered affidavits did not establish that Young was involved in the 1995 incident or that she purposely misidentified the killer. Appellant's arguments amounted to little more than bare accusations of misconduct; such hearsay allegations are not probative of untruthfulness. The Court held that the trial court did not abuse its discretion by limiting the inquiry into the incident.

Finally, the Court held that the trial court appropriately excluded appellant's proffered extrinsic evidence. Appellant, realizing that Rule 5-608(b) prohibited extrinsic evidence, attempted to introduce such evidence as showing bias or motive to lie as permitted by Rule 5-616(b)(3). The Court of Appeals observed, however, that the evidence, at best, related to Young's character trait for truth and veracity, not to bias or motive to lie. The 1995 incident was entirely unrelated to the instant case, and appellant presented no cogent argument to the contrary. Furthermore, the Court noted that the trial court allowed appellant a full opportunity to cross-examine Young as to bias and motive to lie. Accordingly, the trial court properly excluded the extrinsic evidence as it was prohibited under Rule 5-608(b).

Dean James Pantazes v. State of Maryland, No. 142, September Term, 2002, filed August 29, 2003. Opinion by Raker, J.

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CRIMINAL LAW - SENTENCING - AUTHORITY OF TRIAL COURT IN SENTENCING  
A PROBATION VIOLATOR IS LIMITED TO THAT PORTION OF ORIGINAL SENTENCE  
THAT WAS SUSPENDED BY THE COURT AND NOT ACTUALLY SERVED.

Facts: In 1998, appellant, Jeremiah Benedict, was convicted of second degree assault and malicious destruction of property. Appellant was sentenced to 10 years imprisonment on the assault conviction, and 3 years imprisonment on the malicious destruction conviction, both to be served concurrently. The court suspended all but 18 months of each sentence in favor of unsupervised probation for three years. Appellant was released from prison after approximately 280 days due to diminution credits he received. Shortly after his release, appellant was arrested and charged with first and second degree assault, reckless endangerment, and violation of his probation for physically attacking another individual. Appellant was sentenced to 10 years for the new crimes, following which the court revoked his probation and directed that he serve the entire 10 years of the previous sentence, with credit for time already served, to run consecutive to the new sentences. In a motion to correct an illegal sentence, appellant claimed the court lacked the authority to direct execution of the previously unsuspended part of the sentence. The trial court denied relief.

Held: Reversed. In harmonizing Maryland statutory provisions governing criminal sentencing, the Court held that, when dealing with a split sentence, the court, in revoking probation, may direct execution of all or part of the previously suspended part of the sentence, but not of any part of the sentence that the court initially directed to be served in prison.

Jeremiah Benedict v. State of Maryland, No. 111, September Term, 2002, filed September 8, 2003. Opinion by Wilner, J.

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OF CORRECTION DIRECTIVES VIOLATE THE *EX POST FACTO* CLAUSES OF THE FEDERAL AND STATE CONSTITUTION

Facts: As head of the DOC, the Commissioner of Correction ("Commissioner") has the responsibility for the division's operation and conduct. The Commissioner establishes the formal written policies of the DOC through the promulgation of Division of Correction Directives (DCDs), which are recorded and disseminated to ensure consistent and legally compliant agency operation. All personnel who participate in the DCD development and approval process fall under the authority of the Commissioner.

The DOC operates facilities for the confinement of prisoners at four different security levels: maximum, medium, minimum, and pre-release. Inmate reclassification occurs at the discretion of the Commissioner. Under the DOC's previous system of security classification, no category of prisoner was precluded from progressing below medium security. On June 1, 1995, DOC issued DCD 100-005, which stated in part that, "[i]nmates serving life sentences shall be initially classified to no less than maximum security and shall not be reclassified below medium security." This section also provides that an inmate who is serving a term of confinement for a rape or sex offense, "shall not be reduced below medium security unless approved for a delayed parole release contingent upon a transfer to lesser security . . . or unless within one year of a mandatory supervision release date or maximum expiration release date."

Prior to June 2, 1993, inmates serving life sentences had opportunities to obtain work-release privileges. On June 2, 1993, through DCD 100-508, the Commissioner suspended the work release privileges of all inmates serving life sentences. On February 1, 1997, the DOC amended DCD 100-508, to render inmates serving life sentences "ineligible for work release." DCD 100-508.II.D states that an inmate "who has escaped during the current incarceration" "shall be ineligible for work release."

The Commissioner also has statutory authority to grant family leave. Until June 2, 1993, when the Commissioner declared all life-sentenced inmates ineligible for family leave, inmates serving life sentences who had met certain criteria of the DOC could receive family leave. On April 15, 1997, DOC issued DCD 100-543, which stated that "[i]nmates serving life sentences, including life with all but a portion suspended, and inmates under a sentence of death are not eligible for family leave consideration."

This case originated in the Inmate Grievance Office ("Grievance Office"), which dismissed the grievances of three inmates of the DOC: Glenn Watkins, John Dillard, and Gerald Fuller ("Appellants"). Appellants had complained before the Grievance Office that either some or all of DCDs 100-005, 100-508, and 100-543 violated the

constitutional prohibition against *ex post facto* laws. The DCDs at issue became effective after Appellants began serving their sentences and, according to Appellants, deprived them of the opportunity for parole and could extend their period of incarceration. The Grievance Office dismissed Appellants complaints, and Appellants sought judicial review in the circuit courts located in the counties where they were confined. In each of Appellant's cases, the circuit courts affirmed the decision of the Grievance Office, denying relief to Appellants.

Appellants each appealed from the judgments of the circuit court that denied them relief. By order of the Court of Special Appeals, Appellants' cases against the Secretary of the Department of Public Safety and Correctional Services were consolidated for the purpose of the appeal. Before any proceedings in the Court of Special Appeals, the Court of Appeals issued a writ or certiorari to consider whether DCDs 100-005, 100-508, and 100-543 violate the constitutional prohibition against *ex post facto* laws.

Held: The DCDs at issue in this case do not violate the prohibition against *ex post facto* laws, because they are not "laws" within the meaning of United States Constitution or Maryland Declaration of Rights. Rather, the DCDs were guidelines promulgated as an exercise of the discretion of the Commissioner of Correction who has authority to modify them.

Glenn Watkins, John Dillard, & Gerald Fuller v. Secretary, Department of Public Safety and Correctional Services, No. 118, September Term, 2002, filed September 9, 2003. Opinion by Battaglia, J.

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REAL PROPERTY – JOINT TENANCY – JUDGMENT AGAINST CO-TENANT – SEVERANCE – LEVIES – EXECUTION.

Facts: Constance Helinski owned certain improved property in Harford County in joint tenancy with Petitioners. To collect on a personal judgment it obtained against Helinski, Harford Memorial Hospital filed a Notice of Lien against her interest in the property. Although the sheriff had received from the Clerk's office the Writ of Execution on the lien, he did not attempt to execute the writ until after Helinski's death. Contending that the property passed to them free of the lien at Helinski's death, Petitioners filed a Motion to Release the Property from Levy in the District Court of Maryland, sitting in Harford County, which motion was denied. Petitioners appealed to the Circuit Court for Harford County, which affirmed the District Court and held that the date of execution of the writ relates back to the date that the writ was delivered to the sheriff.

Held: The Court of Appeals reversed the decision of the Circuit

Court and remanded the case with directions that the Circuit Court reverse the judgment of the District Court and direct that court to grant Petitioners' Motion to Release the Property from Levy. The Court concluded that a joint tenancy must be severed in order to levy upon the interest of an individual joint tenant. Mere delivery of the writ of execution to the sheriff was insufficient to effect a severance because mere delivery does not interfere with any of the four unities that define a joint tenancy. As the writ was not executed before the judgment debtor's death, the unities of time, title, interest, and possession remained intact until her death. Consequently, the judgment debtor's interest in the property passed to the surviving co-tenants at the time of her death, and no severance occurred before her death. Finally, the court held that the date of execution does not "relate back" to the date the sheriff receives the writ.

Helinski v. Harford Memorial Hospital, Inc., No. 133, September Term, 2002, filed August 27, 2003. Opinion by Harrell, J.

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TORTS - NEGLIGENCE - HUNTING ACCIDENT - LIABILITY OF LEADER OF HUNTING PARTY FOR ACTS OF MEMBERS - NECESSITY AND EXISTENCE OF DUTY TO THIRD PARTIES.

Facts: Prior to sunrise on the morning of 28 November 1998, Charles Montgomery and his son, Brian, laid hidden in shrubbery on the elder Montgomery's property in Frederick, Maryland, awaiting the official start of the shotgun deer hunting season. At approximately 6:00 a.m., the two heard another hunter taking a position in a nearby tree stand on the property. Because of the arrival of the other hunter, the Montgomerys decided to move to another location.

While preparing to depart from the hidden position, Charles Montgomery moved to massage a leg cramp. In response to his movement in the bushes, but before properly identifying his target and prior to the legal inception of the deer hunting season, the newly arrived hunter fired a single shot into the bushes. The ensuing shotgun slug first grazed Brian's neck, causing a severe abrasion on his neck and temporary deafness, before passing through Charles' upper right arm (injuring the humerus bone, severing the main artery to the upper

right arm, and damaging surrounding nerves), and lodging finally in Charles' upper right torso.

The shooter, James Remsburg, Jr. ("Remsburg Jr."), a 27-year old emancipated adult who had been on over 550 previous hunting outings, arrived in the woods that morning as a member of a hunting party organized by his father, James Remsburg, Sr. ("Remsburg Sr."). Although the Montgomerys and Remsburgs were unaware that each other planned to hunt in similar locations that morning, the two families were well acquainted and had a long history of interactions regarding hunting rights on the property. On the morning of the accident, Remsburg Sr. and all other members of the Remsburg hunting party, with the exception of Remsburg Jr., were positioned on the Payne property adjoining the Montgomery property. Remsburg Jr. was positioned in the tree stand located on the Montgomery property, which he built approximately 15 years earlier. Remsburg Sr. had express permission to hunt on the Payne property at the time, but had not secured such permission regarding the Montgomery property for the 1998 hunting season.

The Montgomerys timely filed suit in the Circuit Court for Frederick County against the Remsburgs alleging trespass and negligence. Remsburg Jr. settled with the Montgomerys and was dismissed from the suit. Remsburg Sr. filed a Motion for Summary Judgment, alleging that the Montgomerys failed to assert properly the existence of a legally cognizable duty owed by Remsburg Sr. to the Montgomerys to protect them from the negligent acts of a third party, namely Remsburg Jr., and further, that the Montgomerys also failed to establish their trespass claim. Summary judgment was entered for Remsburg Sr. on all counts. The Montgomerys appealed to the Court of Special Appeals, which issued a reported opinion on 1 November 2002 affirming the Circuit Court judgment as to the trespass count, but vacating the lower court judgment with respect to the negligence claim. *Montgomery v. Remsburg*, 147 Md. App. 564, 810 A.2d 14 (2002). Remsburg Sr.'s petition for certiorari was granted by the Court of Appeals.

Held: Judgment of the Court of Special Appeals reversed, case remanded to that court with directions to affirm the judgment of the Circuit Court for Frederick County. Remsburg Sr., as a matter of law, was not liable for the injuries to the Montgomerys arising out of Remsburg Jr.'s negligent conduct. Remsburg Sr. was under no duty to control the acts of Remsburg Jr., or to protect the Montgomerys from the acts of Remsburg Jr. Without a duty there can be no actionable negligence, and as such, the trial court's grant of summary judgment in favor of Remsburg Sr. was proper.

The Court observed that, generally, there is no duty to control the actions of a third person or to protect another from the actions of a third person, in the absence of a special duty. Such a "special duty" may be established by "(1) statute or rule; (2) by contractual or other private relationship; or (3) indirectly or impliedly by

virtue of the relationship between the tortfeasor and a third party." *Bobo v. State*, 346 Md. 706, 715, 697 A.2d 1371, 1376 (1997). The Court found that, under the undisputed material facts of this case, such a special duty had not been placed upon Rensburg Sr.

Rensburg v. Montgomery, No. 129, September Term, 2002, filed August 27, 2003. Opinion by Harrell, J.

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## COURT OF SPECIAL APPEALS

CIVIL PROCEDURE - - RES JUDICATA - JUDGE DID NOT ERR IN GIVING RES JUDICATA TO A CONSENT JUDGMENT ALLEGEDLY OBTAINED BY A FRAUD ON THE COURT, NOR WAS IT ERROR TO PRECLUDE CLAIMS UNDER THE MARYLAND CONSUMER DEBT COLLECTION ACT AGAINST EITHER THE ORIGINAL PLAINTIFF



OR ANOTHER PARTY IN INTEREST.

Facts: In 1995, Cordella Green purchased a Ford vehicle that was financed by a loan from a Ford dealer. The loan contract, governed by Title 12, Subtitle 10, of the Commercial Law Article (CL) of the Maryland Code, was later assigned to Ford Motor Credit Company (FMCC). CL section 1021(e) requires that, to repossess a car or other item, a creditor must send the debtor a notice advising (1) where the item is located and (2) the place where the item will be sold.

After Green failed to make payments on time, FMCC repossessed the vehicle. Shortly thereafter, FMCC sent Green a notice telling her that her vehicle was being put up for sale, and that her vehicle was located and would be sold at the Baltimore Washington Auto Exchange at 7151 Brookdale Road in Baltimore, Maryland. The car was actually located at 7151 Brookdale Road, *Elkridge*, Howard County, Maryland. The car was sold at public auction in Elkridge, resulting in a \$4,854.19 deficiency. FMCC sued Green for the deficiency in December 1998 in the District Court of Maryland for Baltimore City, alleging, *inter alia*, that the repossession and sale were conducted "in accordance with provisions of the installment-sale agreement." This was technically false because the notice misidentified the location of the car, and therefore FMCC had failed to comply with the provisions of 12-1021.

Green entered into a consent judgment with FMCC, by which she agreed to pay the deficiency plus interest by making \$200 monthly payments. When she failed to make the payments on time, her wages were garnished, and the judgment was ultimately satisfied.

Three months after satisfying the judgment, Green filed suit against FMCC. A February 2002 amendment to the complaint added the law firm of Thiebolt, Ryan, Miller, and Hrehorovich, P.A. (TRMH), as defendants.

Green's complaint contained seven counts, the first five of which asserted that FMCC perpetrated a "fraud on the court" by misrepresenting that they had acted in accordance with repossession requirements. She alleged that FMCC had violated provisions of the Maryland Commercial Code and the Unfair and Deceptive Practices Act. Green sought an order voiding the District Court judgment and demanded restitution of the deficiency payment, plus interest and resultant fees.

In two separate counts, plaintiff alleged that FMCC and TRMH (acting as counsel for FMCC in collections matters) violated the Maryland Consumer Debt Collections Act (MCDCA). The trial judge dismissed all counts on the ground of *res judicata* or "claim preclusion." The trial court ruled that the District Court consent and deficiency judgments operated as final disposition barring

relitigation.

Held: Affirmed. Green was unable to show that the consent judgment was obtained through extreme fraud even though FMCC made a false statement regarding their compliance with repossession requirements. FMCC had not committed extrinsic fraud because it was not fraud that actually prevents a trial, nor did Green prove that the judgment was obtained by mistake or irregularity. The court also rejected Green's contention that because FMCC had failed to comply with the MCDCA the District Court lacked jurisdiction to enter either the consent or the deficiency judgments.

Green failed to prove that the consent judgment was invalid, that judgment acted as a conclusive decision to which *res judicata* attached. A finding that FMCC's notice was improper would nullify or contradict the foundation for the initial District Court consent judgment. Therefore, Counts I - V concerning Green's effort to recoup money paid pursuant to the consent judgment were held to be barred on *res judicata* ground.

The same principle applied to Green's claim that FMCC had violated the MCDCA by enforcing a deficiency judgment obtained through defective notice. Just as with the consent judgment, the deficiency judgment was conclusive as to the issue of whether the notice of sale was adequate.

Green's suit against TRMH was also barred by *res judicata*. Although not a party or party in privity to a party involved in the original District Court suit, TRMH shared a common "identify of interest" with FMCC in regard to the claims against the law firm that likewise barred individual claims against it.

Green v. Ford Motor Credit Company, et al., No. 1674, September Term, 2002, filed July 8, 2003. Opinion by Salmon, J.

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CIVIL PROCEDURE - VENUE - EMPLOYMENT DISCRIMINATION - DISCRIMINATION TAKES PLACE IN THE COUNTY WHERE THE ALLEGED DISCRIMINATORY DECISIONS ARE IMPLEMENTED.

Facts: Tanya Pope-Payton ("Pope-Payton") was employed as a

leasing consultant for Realty Management Services, Inc. ("RMS"). She lived in Prince George's County and worked exclusively at two RMS-owned apartment buildings located in Prince George's County. Pope-Payton was diagnosed with multiple sclerosis and was off work for one month. After she returned to work, RMS's general manager invited her to RMS's main office in Montgomery County where she was informed that RMS had decided to downsize its staff at the two Prince George's County locations where Pope-Payton worked and that her position had been eliminated. The general manager told Pope-Payton that she could work for RMS at two other apartment buildings located in Prince George's County. Pope-Payton refused the offer and requested various accommodations for her handicap. RMS rejected Pope-Payton's demands and told her to report to work at the new location.

Pope-Payton then filed suit against RMS in the Circuit Court for Prince George's County, alleging that RMS, in violation of section 2-222 of the Prince George's County Code, discriminated against her: (1) by failing to accommodate her physical handicap, i.e., not allowing her to work in her current position and location or another location that she could reach; (2) by subjecting her to less favorable terms and conditions of employment because of her physical handicap, i.e., never providing her with health insurance but providing it to other non-handicapped employees; and (3) by constructively discharging her in response to her request for reasonable accommodation.

RMS filed a motion to dismiss and/or to transfer venue, contending that venue was proper in Montgomery County because the alleged discriminatory decisions affecting Pope-Payton's employment were made at RMS's main office in Montgomery County. The circuit court transferred the case from Prince George's County to Montgomery County. Pope-Payton filed a motion to alter or amend the judgment, which was denied. She then appealed to the Court of Special Appeals.

Held: Reversed and remanded. Article 49B, section 42(b), provides that an action for discrimination shall be commenced in the circuit court for the county in which the alleged discrimination takes place. The Court held that discrimination "takes place" in the county where the decision to discriminate is implemented, not in the county where the decision is made to discriminate. In so holding, the Court noted that if discriminatory decisions are not implemented no discrimination has "taken place"

The Court pointed out that Pope-Payton worked and lived exclusively in Prince George's County and that the effect of the discriminatory actions were exclusively in the venue chosen by Pope-Payton. The Court also observed that the ordinance she sought to enforce was the ordinance enacted by Prince George's County, the venue she chose. Accordingly, the Court determined that the discrimination, which Pope-Payton alleged, happened in Prince George's County because it was there that RMS's alleged decision to discriminate was implemented.

Pope-Payton v. Realty Management Services, Inc., No. 00081, Sept. Term, 2002, filed January 31, 2003. Opinion by Salmon, J.

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CONSTITUTIONAL LAW—DUE PROCESS—DUTY OF PROSECUTION TO INFORM DEFENDANT OF EXCULPATORY EVIDENCE (BRADY V. MARYLAND AND MD. RULE 4-263(G))—DUTY EXTENDS TO INFORMATION USEFUL FOR IMPEACHMENT OF STATE'S WITNESS—(GIGLIO V. UNITED STATES)—STATE'S ATTORNEY'S OFFICE IS A UNITY AND AS SUCH IT IS THE SPOKESMAN FOR THE STATE—DUTY OF STATE'S ATTORNEY TO ESTABLISH A PROCEDURE FOR INFORMING THE ASSISTANT STATE'S ATTORNEY PROSECUTING A CASE OF ANY WITNESS IMPEACHMENT INFORMATION KNOWN WITHIN HIS OR HER OFFICE, AT LEAST IN ANY CASE IN WHICH THE STATE INTENDS TO RELY ON THE EVIDENCE OF A JAILHOUSE SNITCH OR ANYONE WHOSE CREDIBILITY MAY BE SUSPECTED.

Facts: Tony Williams, appellant, filed a petition for post conviction relief contending that at his trial for murder, the State of Maryland, appellee, failed to disclose material impeachment evidence regarding the State's principle witness, a jailhouse snitch. Appellant maintained that the State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963) entitled him to a new trial.

At the trial, the State proved that on 21 February 1998, the victim was fatally shot outside of her apartment complex in northeast Baltimore. There was no forensic evidence connecting appellant to the murder. In support of its case, the State relied heavily on the testimony of a jailhouse snitch, who testified that appellant confessed to the murder while the two were incarcerated together.

The jailhouse snitch testified that appellant admitted he had killed the victim for insurance money because he was in debt. The snitch denied that anyone from the Baltimore City State's Attorney's Office promised him anything in exchange for his testimony. On cross-examination, he admitted that he had testified in another case in which a defendant had confessed to murder. He stated, however, that he came forward because he was a "good citizen," "against handguns" and "murders."

In closing argument, the State argued that the snitch's

testimony was credible and confirmed appellant's guilt. In her closing, the Assistant State's Attorney, Lynn Stewart, who is now a judge of the Circuit Court of Baltimore City, also alluded to the possibility that the snitch offered the information "out of the goodness of his heart."

Following his conviction for first and second degree murder, as well as for using a handgun in the commission of a crime of violence, appellant was sentenced to life imprisonment and an additional twenty year term. Appellant then appealed on the limited ground of sufficiency of the evidence. In an unpublished opinion filed March 23, 2000, the Court affirmed, concluding that the State's evidence was sufficient to support appellant's conviction. Thereafter, appellant filed the present post conviction petition.

At hearings held over numerous days, a detective for the Baltimore City Police Department testified that the jailhouse snitch had been a paid police informant for at least ten years. In July 1998, the snitch was charged with stealing a battery and a police cruiser from the police department, but, because of his cooperation and value in drug arrests, the snitch received "time served" on the battery theft charge and a "stet" on the police cruiser theft. The detective admitted that confidential informants are not centrally registered and that he was unaware of the snitch's cooperation in murder cases, as his discussions with the snitch were limited only to narcotics cases.

The Assistant State's Attorney in the narcotics division of the Baltimore City State's Attorney's Office, who was assigned to the 1998 police cruiser case, also testified at the post conviction hearings. He testified that he knew of the snitch's cooperation in narcotics cases and had entered the stet because of it. He further testified that he was aware that the snitch had been given a confidential informant identification number.

A detective in the homicide division of the Baltimore City Police Department also testified at the post conviction hearing. He explained that the snitch had offered information regarding two defendants in murder cases. According to the homicide detective, however, the snitch never asked for anything in exchange for his testimony and no offers were made by the detective. The detective further testified that he was unaware that the snitch was a paid police informant.

Appellant's defense counsel at trial, Warren Brown, testified that Judge Stewart assured him that the snitch was not receiving anything from the State in exchange for his testimony against appellant. During Brown's testimony, approximately nine letters from the snitch to the Judge who had sentenced the snitch for possession of cocaine, were admitted into evidence. In the letters, the snitch told the Judge that he had "been very helpful to officers in Homicide" since his arrest, and that he had "told them very

important things in cases," which were to be tried soon. Significantly, in the letter, the snitch included the name of the homicide detective who had been in charge of the investigation in appellant's case. In response to the snitch's letter, the Judge forwarded two letters to the Baltimore City State's Attorney's Office, but not to any particular prosecutor.

Judge Stewart testified that she had not made any offers to the snitch in return for his testimony in appellant's murder trial. Moreover, she stated that she never talked to the prosecutors who were in charge of prosecuting the snitch, nor was she aware that the snitch had been charged with stealing a police cruiser or that the charge had been statted because of his cooperation in narcotics cases.

Following the hearings, the circuit court denied appellant's request for post conviction relief, ruling that there had been no *Brady* violation.

Held: Judgment reversed. Case remanded to the Circuit Court for Baltimore City.

The Court acknowledged that none of the detectives or prosecutors working on appellant's case were aware of the snitch's status as a paid police informant, who had received benefits for his cooperation in narcotics cases. Nevertheless, looking to the letters forwarded to the State's Attorney's Office, the court was satisfied that the Office, generally, had been put on notice that the snitch was seeking modification of his sentence as a reward for his testimony in homicide cases, as well as his cooperation in narcotics cases.

The Court concluded that the State had a responsibility to "take all reasonable measures to safeguard the system against treachery." The Court cautioned: "An explanation by a jailhouse snitch that he is coming forward with the confession of a fellow inmate merely out of the 'kindness of [his] heart,' should give even the most unseasoned prosecutor pause as to the informant's true motives." The Court distinguished the present case from a case in which the Second Circuit refused to impute the knowledge of a Florida prosecutor to a prosecutor in New York. In so doing, the Court noted that, in the present case, the prosecutor who was aware of the snitch's status as a paid informant who had received both money and preferential treatment in exchange for testimony was a prosecutor in the same State's Attorney's Office as the prosecutor in charge of appellant's case.

As to the materiality prong of the *Brady* test, the Court recognized that, other than the snitch's testimony, the only evidence directly linking appellant to the murder was the self-contradictory testimony of one of the victim's neighbors. There was

no forensic evidence linking appellant to the murder. The remainder of the State's evidence was purely circumstantial. Thus, the Court was satisfied that the undisclosed evidence was material. Furthermore, the Court concluded that appellant's defense counsel's cross-examination of the snitch would certainly have been more effective if he had been aware that the snitch was asking a judge for consideration for his testimony in this case.

Tony Williams v. State of Maryland, No. 2161, September Term, 2002, filed September 4, 2003. Opinion by Bloom, J. (Ret., specially assigned).

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#### CONSUMER PROTECTION ACT - ATTORNEYS' FEES

Facts: Paulette Blaylock, appealed a circuit court judge's grant of \$5,000 of attorneys' fees when she sought almost \$49,000 from Johns Hopkins Federal Credit Union ("the credit union").

In 1990, Blaylock, an employee of Johns Hopkins and a member of the credit union, purchased a car. To finance the purchase, she borrowed \$9,765.74 from the credit union and agreed to repay the loan with interest in sixty monthly payments of \$211.38. Blaylock also signed an agreement to provide car insurance. The agreement also contained a provision stating that, if she failed to provide proof of insurance, the credit union could buy insurance and add the cost to her monthly payment total.

For approximately six years, \$211.38 per month was deducted from Blaylock's account. Although Blaylock did not notice the additional fees charged, each year her statement contained a "loan add on" line. The "add ons" for the years 1990-1995 totaled \$8,212. Blaylock contacted an attorney to find out why she still owed money after making six years of payments and was informed for the first time, in 1996, that the credit union claimed it had purchased insurance on her behalf and charged her for the insurance because she failed to provide them with proof of insurance. After Blaylock supplied proof of insurance for 1996, the credit union deducted \$1,001., the amount it had charged her for 1996. Thereafter the credit union continued to deduct \$211.38 each month.

In June of 1997, Blaylock was laid off, and because no additional funds were placed in the account, her payments ceased. At that time, Blaylock had paid \$17,775.92 to the credit union on her loan. Shortly after the payments ended, Blaylock's car was repossessed and the credit union informed her that she still owed \$9,124.92 in principal and interest on the loan. Blaylock was informed by letter that she must pay the remaining balance plus \$275. in costs for repossessing the car or the car would be sold at public auction on November 11, 1997. The car was sold on November 1, 1997 for \$1,600. The deficiency owed to the credit union was then calculated to be \$8,235.54.

In December 1997, the credit union filed suit against Blaylock in the Baltimore City District Court seeking \$8,235.54 in principal, \$224.82 in interest and \$1,235.33 for attorneys fees.

Blaylock prayed a jury trial and the case was removed to the circuit court. Blaylock later filed a counterclaim alleging violation of the Maryland Consumer Protection Act, breach of contract, fraud, conversion, negligent misrepresentation, and unjust enrichment. On December 8, 1999, Blaylock filed an amended complain adding a cout alleging a violation of the Uniform Commercial Code. Blaylock then filed a motion for summary judgment as to the credit union's complaint and her counterclaim. The motion was eventually denied. Later, the credit union agreed to pay Blayloc \$7,300. and dismiss all claims against her. The parties all agreed that Blaylock was the "prevailing party" and that, uin order to determine the issue of attorney's fees, Blaylock would submit a petition for attorney's fees to the court and the credit union would file a response.

A hearing was held on the attorney's fees issue at which the credit union did not present any evidence or contest the time spend or the rates chearged by Blaylcok's attorneys. The credit union contended that Blaylock was entitled to no attorney's fees because she failed to prove that she prevailed on the consumer protection count in her counterclaim. The circuit court rejected this contention, but found that Blaylock was entitled to only \$5,000 in attorney's fees based upon (1) the discrepancy between the recovery amount and the amount of attorney's fees sought by Blaylock and (2) the belief that the case should have stayed in the District Court.

Held: Judgment vacated and case remanded. A borrower is entitled to an award of reasonable attorney's fees after settling their Consumer Protection Act (the "Act") claim. No judgment or consent decree is necessary to establish the party's status as the prevailing party when the court-approved settlement provides that Blaylock was the prevailing party. The trial judge erred in reducing the attorne's fees based on his belief that the case should have remained in the District Court because it was plain to no competent attorney would have failed to remove the case to the circuit court where more extensive discovery could be obtained. The



Court also held that, in awarding attorney's fees, the trial judge should not have focused exclusively on the dollar amount recovered by the consumer because to do so would undermine the remedial purpose of the Act.

Paulette D. Blaylock v. Johns Hopkins Federal Credit Union, No. 1994, September Term 2001, filed September 9, 2003. Opinion by Salmon, J.

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CRIMINAL LAW - SEARCH AND SEIZURE - DRUGS - VEHICLE - EVIDENCE - MOTION TO SUPPRESS - REASONABLE ARTICULABLE SUSPICION - INDEPENDENT CONSTITUTIONAL JUSTIFICATION - INFORMATION TIP - PERIMETER DRUG-DOG SCAN - MOMENTARY DETENTION - SECOND STOP - SEARCH INCIDENT TO LAW ARREST.

Facts: On September 27, 2001, the Queen Anne's County police department learned from the Talbot County Drug Task Force that appellant would be transporting a large quantity of cocaine through the County in a red Ford Escort via Maryland Route 50 later that day. Based on that tip, the Queen Anne's County police deployed officers along Route 50 with the intention of stopping appellant if they saw him violate any traffic laws. The officers also made arrangements for a drug-sniffing dog to be waiting near the anticipated location of the stop.

When the officers spotted the red Ford Escort traveling 63 mph in a 55 mph zone, they effectuated a traffic stop of the vehicle. Appellant could not produce his driver's license, which prompted the police to have him step out of the vehicle. As the appellant was getting out of his car, which was about two minutes after he was stopped, the canine unit arrived and the police directed appellant to return to the car.

As the canine officer approached, he instructed the officer who had been questioning appellant to step away from appellant's car so that the dog could conduct an unimpeded perimeter scan of the car's exterior. The officer was still holding the vehicle's registration when he moved toward the back of appellant's car. The dog "alerted" on the vehicle after a two-minute scan. The dog's alert signaled the presence of drugs.

The officer then re-approached the vehicle and again asked the appellant to step out. As appellant was doing so, the officer noticed a bulge in his front jacket pocket and a brown paper bag

sticking out of the same pocket. The officer asked appellant what the bulge was, but before he received a reply the officer "grabbed" the bulge area and immediately knew from his fifteen years experience as a police officer that the bulge's mass felt like the type and amount of cocaine they expected he was transporting. The officer pulled the bag out of appellant's pocket and examined its contents, finding the cocaine. Appellant was then arrested.

Appellant moved to have the drugs suppressed as the product of an illegal search and seizure. He argued that an illegal "second stop" occurred when the police officer "abandoned" the initial traffic-stop investigation by stepping away from the vehicle to allow the canine unit to scan the vehicle. He also claimed the search of his person was illegal because it happened before he was placed under arrest. The trial court denied the motion.

Held: Judgment affirmed. The Court held that when the police stopped their endeavors in relation to the traffic violation they had independent constitutional justification for detaining appellant concerning possession of cocaine. That justification came from information received from the Talbot County Drug Task Force that appellant would be transporting a large quantity of cocaine. Therefore, even if the suspension of the traffic investigation and attendant detention of appellant, to allow the dog to scan the vehicle, constituted a "second stop," such a stop was reasonable.

The Court also held that the officer's search of appellant was valid even though made seconds before his arrest, because the search was "essentially contemporaneous" with his arrest and therefore permitted as a search incident to a valid arrest.

Bruce Dornell Wilson v. State of Maryland, No. 00204, Sept. Term, 2002, filed May 5, 2003. Opinion by Salmon, J.

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EVIDENCE - UNFAIR PREJUDICE - REVERSIBLE ERROR - RELEVANCE - DISCRETION - TRIAL JUDGE DID NOT ERR BY PERMITTING DEFENDANT TO TESTIFY REGARDING THE CAUSE OF HIS PRESENT UNEMPLOYMENT AND OBVIOUS PHYSICAL DISABILITY.  
CIVIL PROCEDURE - JURY INSTRUCTIONS - JURY SYMPATHY.  
DAMAGES - CORRELATION TO EVIDENCE.

Facts: Robin Hodge was the plaintiff in a motor-tort suit

against Michael Babel. The defendant conceded liability, and therefore the sole question presented to the jury was the amount of damages the plaintiff suffered as a result of the accident. At the trial on damages, the trial court permitted, over objection from plaintiff's counsel, defense counsel to elicit testimony from the defendant that he was presently unemployed because he suffered from progressive Multiple Sclerosis.

On appeal, appellant claimed that the defendant's testimony regarding his medical condition was irrelevant and unfairly prejudicial because it invoked jury sympathy that resulted in an inadequate damages award.

Held: Judgment affirmed. The trial judge did not commit reversible error by permitting the defendant to testify regarding the cause of his physical disability. Because reviewing courts afford trial judges wide latitude concerning questions dealing with the admissibility of evidence and because there was a substantial likelihood that the appellee's obvious physical ailment would invoke jury curiosity even if the defendant had not testified to the cause of his disability, it was not unfairly prejudicial to permit the appellee to explain the reason for his present unemployment, i.e., his serious and apparent physical disability.

The Court noted that the trial judge instructed the jury not to consider sympathy for the defendant and that appellee's counsel had not appealed to the jury for sympathy for his disabled client. The Court further noted that the jury's damage award correlated with the exact amount of expenses appellant incurred for her injuries up to a specific date. The jury awarded no damages for costs appellant incurred past that date, which strongly suggested that the judgment was based on logic - not bias or sympathy.

Robin Vania Hodge v. Michael Allen Babel, No. 1930, Sept. Term, 2001, filed January 30, 2003. Opinion by Salmon, J.

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LIMITATION OF ACTIONS- DEFENSE IN CIVIL TORT ACTION - ACCRUAL DATE OF CAUSE OF ACTION - INQUIRY NOTICE

Facts: In 1990, the appellant, Thomas Moreland, was injured

at work and required extensive medical treatment. The appellee, Aetna U.S. Healthcare, paid the cost of Moreland's care, pursuant to a service agreement between the parties. The service agreement included a clause purporting to subrogate Aetna to the appellant's rights of recovery against tortfeasors and entitle it to reimbursement of medical and hospital expenses it paid, plus attorneys' fees and costs. Accordingly, when Moreland settled with the tortfeasor, and his attorney forwarded a check to Aetna to cover his medical and hospital expenses.

More than eight years later, the Court of Appeals held that an "HMO may not pursue its members for restitution, reimbursement, or subrogation after the members have received a financial settlement from a third-party tortfeasor." *Reimer v. Columbia Med. Plan*, 358 Md. 222, 223 (2000). The General Assembly responded to that decision by enacting Senate Bill 903, Ch. 569, 2000 Md. Laws, authorizing subrogation clauses in contracts between HMOs and their subscribers. Although the legislation was intended to be retroactive to January 1, 1976, the Court of Appeals subsequently held that such retroactivity violated the Maryland Constitution. *Harvey v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, 370 Md. 604, 611 (2002).

In 2001, in the Circuit Court for Prince George's County, Moreland sued to recover the reimbursement money paid to Aetna following the 1991 tort settlement. Moreland alleged that Aetna's subrogation lien against their recovery in the tort action was improper because, under *Reimer*, Aetna is without authority to include a subrogation clause in the agreement and to exercise a right of subrogation.

Aetna moved to dismiss, arguing, *inter alia*, that Moreland's claims were time barred because his causes of action accrued on October 3, 1991, but he did not file suit until more than three years later. Moreland argued that his causes of action did not accrue until March 10, 2000, when the Court of Appeals decided *Reimer*. The circuit court dismissed Moreland's claim on the ground of limitations, and he appealed.

On appeal, Moreland claimed that, under the "discovery rule," as explained in *Poffenberger v. Risser*, 290 Md. 631, 634-35 (1981), he was not on inquiry notice of his causes of action until March 10, 2000, when *Reimer* was handed down by the Court of Appeals. Moreland argued that, since the case was filed within three years of the date of *Reimer*, the suit was timely.

Held: Affirmed. For the purposes of the judicially created "discovery rule," inquiry notice pertains to notice of facts, not notice of the law. A cause of action accrues when the plaintiff reasonably knows or should know of the wrong; and that occurs when he has knowledge of circumstances that would put a person of

ordinary prudence on inquiry, thus charging him with notice of all facts which a diligent investigation in all likelihood would reveal. By contrast, a plaintiff's knowledge of the law is presumed, as all people are presumed to have knowledge of the law. Claiming ignorance of the law, when on inquiry notice of the facts, does not delay the accrual date of a cause of action.

Appellant Moreland conceded that, in 1991, when the tort claim was settled, he had actual knowledge of all the facts on which his eventual claims against Aetna were based. He argued, however, that, because he was not aware of the legal remedies available to him, he was not on inquiry notice of his causes of action, and therefore his causes of action did not accrue at the time the tort case was settled.

The Court rejected Moreland's accrual arguments and noted that his theory is premised entirely on notice of the law, not on notice of the facts. The Court pointed out the logical extension of Moreland's theory - that had *Reimer* not been brought, his causes of action still would not have accrued - exposes its fallacy. The Court thus held that the decision in *Reimer* had no bearing on the accrual date of Moreland's causes of action against Aetna.

Moreland v. Aetna U.S. Healthcare, No. 2218, September Term 2001, filed September 8, 2003. Opinion by Eyler, Deborah S., J.

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REAL PROPERTY - POWER OF SALE FORECLOSURE - DEFAULTING PURCHASER'S COMMON LAW RIGHT TO SURPLUS PROCEEDS OF RESALE - PARTIES' ABILITY TO "CONTRACT OUT" OF COMMON LAW RULE

Facts: Pursuant to a power of sale clause in a deed of trust, Washington Mutual Bank, FA, successor to Home Savings of America, F.S.B. ("Lender") initiated foreclosure proceedings on property located at 5511 Fisher Road in Prince George's County. Elizabeth A. White, Nancy P. Regelin, and Patrick M. Martyn, Substitute Trustees ("Trustees") advertised the April 20, 1999 sale in a local newspaper of general circulation. Under a section entitled "Terms Of Sale," the advertisement announced, *inter alia*, that, in the event the purchaser defaulted for any reason, "[t]he purchaser shall

not be entitled to any surplus proceeds or profits resulting from any resale of the property." At the April 20 sale, David J. Simard, appellee/cross-appellant, made the winning \$53,000 bid. On that date, Simard signed a "Memorandum of Purchase at Public Auction," in which he certified that he had purchased the property "subject to the conditions stated" in the advertisement. The Circuit Court for Prince George's County ratified the sale. The net proceeds of this sale were insufficient to pay the secured debt and accrued interest, and left a \$51,424.34 deficiency on the mortgage account.

Simard defaulted on his purchase of the subject property by not timely completing settlement. Therefore, the court issued an Order Directing Resale Of Mortgaged Property At Risk And Cost Of Defaulting Purchaser. The Trustees advertised the resale in the same manner as the initial sale, and as subject to identical terms of sale. At the February 22, 2000 resale, Simard again made the winning bid on the property, this time bidding \$101,141. He again signed a Memorandum of Purchase at Public Auction after the resale. With no exceptions before it, the court ratified the resale.

The court thereafter referred the matter to an auditor to state an account. In his report, the auditor stated that the resale had produced a surplus profit of \$46,831.29, and authorized payment of this surplus to the mortgage account, pursuant to the term of sale in the advertisement. Simard filed exceptions to the auditor's report, claiming entitlement to the surplus proceeds. The circuit court ruled that Simard was entitled to the surplus proceeds under an established Maryland common law rule, and remanded the matter to the auditor to restate the account. The auditor's restated account not only credited Simard with the surplus proceeds, but also awarded the Lender and Trustees, appellants/cross-appellees, with attorney's fees in connection with Simard's exceptions. The court thereafter ratified the auditor's restated account, denying the Lender and Trustees' exceptions.

Held: Judgment vacated. Although in Maryland the defaulting purchaser has a common law right to the surplus proceeds of resale, a purchaser may "contract out" of this common law rule, thereby waiving his entitlement to any surplus in the event of a default, by bidding on property advertised as subject to a contrary term of sale. Here, by bidding on the property and signing the memorandum of purchase at the initial sale, Simard agreed to waive his common law right to any surplus proceeds of a subsequent resale. Simard suffered no inequity or undue disadvantage from the waiver of surplus clause in the advertised terms of sale. Furthermore, no public policy justified invalidation of the waiver of surplus clause.

Simard did not preserve his challenge to the court's award of attorney's fees because he did not file exceptions to the auditor's restated account.

Elizabeth A. White, et al. v. David J. Simard, No. 1152, September Term, 2001, filed September 5, 2003. Opinion by Adkins, J.

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SIXTH AMENDMENT - SPEEDY TRIAL RIGHT - BARKER FACTORS

EVIDENCE - RELEVANCY - PREJUDICE, HOSTILITY, AND CONFUSION OF ISSUES

TRIAL WITNESSES - EMOTIONAL OUTBURSTS - MISTRIAL

SECOND DEGREE MURDER - JURY INSTRUCTIONS - HARMLESS ERROR

Facts: Tariq Malik and three co-defendants kidnapped Alvin Thomas and forced him to help them obtain drugs and money. They took Thomas to his sister's house and, after they gained entry and searched for drugs and money, Malik and his co-defendants gathered the occupants of the house in the basement. Before leaving, and while Thomas waited with a co-defendant outside the house, Malik and two other co-defendants shot and killed the five women in the house, including Thomas's sister and mother. After his arrest, a jury sitting in the circuit Court for Baltimore City convicted Malik of five counts of first degree murder and related offenses. Following his conviction, the Circuit Court sentenced him to six consecutive life sentences.

Held: Vacated in part, affirmed in part. Although a delay of twenty-three months is presumptively unreasonable under the *Barker v. Wingo* standard for determining whether a defendant's right to a speedy trial was violated, the other factors weighed against dismissing the case. The trial court's decision to preclude Malik from using certain evidence related to a survivor of the crimes, whom Malik alleged was actually the perpetrator, was also proper. The evidence would have caused jury prejudice and hostility and would have confused the issues.

The trial court used sound discretion in denying Malik's motion for mistrial because of emotional outbursts from two witnesses during their testimony. Although emotional outbursts are not evidence, the trial judge issued a curative instruction to prevent the jury from considering them as such. A mistrial is appropriate

only when it is the only way to serve justice.

The trial court erred in failing to give the jury a second degree murder instruction. Malik produced the minimum threshold of evidence necessary to establish a *prima facie* case that would permit a jury to rationally conclude that he committed second degree murder, and not first degree premeditated murder. None of the witnesses presented by the State at trial were in the house when the murders occurred. Accordingly, the evidence could support a conclusion that Malik did not premeditate the murders, but committed them in response to some event that may have occurred in the house. As to his convictions for felony murder, any error did not influence the jury's verdict.

Malik v. State, No. 2487, September Term 2001 (filed September 8, 2003). Opinion by Sonner, J.

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STATUTES - PREEMPTION OF LOCAL LAW BY STATE LAW - STATE BOAT ACT - STATE WILD WATERFOWL ACT - AMENDMENT TO KENT COUNTY BOAT MOORING ORDINANCE.

Facts: Herschell B. Claggett, the appellee, purchased a 340-acre waterfront farm on Worton Creek, in Kent County. Claggett applied to the Department of Natural Resources ("DNR") for a license to erect offshore stationary blinds and blind sites to hunt waterfowl. Worton Creek Marina, LLC ("WCM") operates a marina directly across Worton Creek from Claggett's farm. Pursuant to Article 68 of the Code of Public Local Laws of Kent County ("KCC"), WCM obtained a permit from the Kent County Public Landings and Facilities Board ("Board") to maintain 54 commercial boat moorings outside its riparian property line in Worton Creek. These moorings and the attached boats reach inside Claggett's adjacent riparian property line in Worton Creek, rendering his offshore stationary blinds and blind sites unusable. At the time, KCC section 68-10 required moorings in waterfowl blind areas to be cleared of boats during the "designated waterfowl hunting season," unless written permission was obtained from the riparian property owner. WCM kept boats at its moorings located inside Claggett's riparian property line from September 1, 2000, to November 1, 2000, the 2000-2001



waterfowl hunting season as designated by DNR. Claggett requested WCM clear the boats, but it refused.

Claggett sought relief from the Board, to no avail. He then brought a declaratory judgment action in the Circuit Court for Kent County against the Kent County Commissioners ("Commissioners") to determine the meaning of "designated waterfowl hunting season" under section 68-10. On May 5, 2001, the circuit court issued a declaration that section 68-10 applies to all waterfowl hunting seasons in Kent County, as designated by DNR, and requires the removal of all boats moored within 250 yards of a licensed blind site prior to any waterfowl season in Kent County.

On July 3, 2001, by emergency legislation, the Commissioners amended section 68-10 by deleting the words "designated waterfowl hunting season" and replacing them with language requiring all vessels on commercial moorings to be removed by November 1 of a given year until March 1 of the following year. Because waterfowl hunting season typically begins in early September, the practical effect of the amendment allowed marinas with permits obtained under section 68-10 to moor boats during the first two months of a waterfowl season.

Pursuant to this amended section, WCM again refused at the start of the 2001-2002 waterfowl hunting season to remove the boats from its commercial moorings. On August 16, 2001, Claggett filed in the Circuit Court for Kent County a second declaratory judgment action seeking a determination that section 68-10, as amended, was preempted and therefore invalid, and an injunction preventing the Commissioners from enforcing it. The circuit court granted declaratory and injunctive relief. The court ruled that section 68-10, as amended, was preempted by state general laws giving riparian landowners the right to the exclusive use of the water in front of their property to erect blind sites. The court also found the amended ordinance in direct conflict with a State Boat Act provision prohibiting mooring placements from infringing on the rights of any riparian property owner. Alternatively, the court found preemption by implication by the state's established comprehensive system for licensing of waterfowl hunting in front of riparian land.

Held: Affirmed. The amendment to the Kent County boat mooring ordinance allowing holders of certain boat mooring permits to moor vessels for two months of the open season for hunting waterfowl, in waters where riparian landowners are entitled to maintain and use licensed blind sites, is preempted by conflict with provisions of the State Boat Act and regulations promulgated thereunder. Specifically, the Court of Special Appeals found the amended ordinance in direct conflict with the regulations prohibiting placement of boat moorings in such a manner that infringes on the rights of riparian property owners. COMAR 08.04.13.03(c)(2). The Court determined that the amended ordinance did precisely what these regulations prohibit - infringe on the rights of riparian owners to

use their shorelines to hunt waterfowl. The Court also concluded that the amended ordinance frustrated the purpose of the state blind site licensing laws by preventing owners from using their blind sites during part of the waterfowl hunting season.

The Court, however, refused to find implied preemption by legislative occupation of the field of waterfowl hunting or by the State Boat Act. The Court noted that although waterfowl hunting from offshore blind sites and boat mooring are both activities taking place in the water, one cannot reasonably infer that the amended ordinance fell within the state's longstanding regulation in the field of waterfowl hunting. Similarly, the court concluded that the amended ordinance was not impliedly preempted by the State Boat Act because that law expressly provided for concurrent jurisdiction to local governments to regulate in the field.

County Comm'rs of Kent County v. Claggett, No. 2165, September Term 2001, filed August 28, 2003. Opinion by Eyler, Deborah S., J.

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#### TORTS - PUBLIC ENTITY LIABILITY - CLAIM PRESENTATION

Facts: On December 7, 1997, an altercation occurred between Candelero and a Maryland State Trooper. As a result, Candelero was charged with second degree assault, resisting arrest, disorderly conduct, wearing and carrying mace, and disobeying the lawful order of a police officer. The State *nolle prossed* all of the charges except disobeying the lawful order of a police officer, for which Candelero was convicted.

Because of injuries allegedly sustained during the altercation, Candelero submitted a written claim to the State Treasurer, as required by the Maryland Tort Claims Act ("MTCA"), Md. Code (1984, 1999 Repl. Vol.), § 12-101 *et seq.* of the State Government Article ("SG"). The claim was sent by certified mail on December 7, 1998, and received by the Treasurer on December 9, 1998. In December 2000, Candelero filed a nine-count complaint against the Maryland State Police and the State of Maryland ("appellees"), seeking damages for assault ("count I"), battery ("count II"), false arrest ("count III"), false imprisonment ("count IV"), intentional infliction of

emotional distress ("count V"), malicious prosecution ("count VI"), invasion of privacy ("count VII"), violation of due process ("count VIII"), and loss of consortium ("count IX").

Appellees filed a motion to dismiss the complaint, arguing, in part, that Candelero could not institute the action because she had not complied with SG § 12-106 (b)(1), requiring that a written claim be submitted to the Treasurer within one year "after the injury." Specifically, they contended that the claim had not been received by the Treasurer until December 9, 1998, more than one year after the injury. The circuit court agreed, dismissing counts I through IV and VII and VIII.

Appellees then filed a motion for summary judgment, arguing that count V should be dismissed because it was undisputed that Candelero had not complied with the notice requirement of SG § 12-106(b)(1). They also contended that because Candelero's "arrest and [the] criminal proceeding" were based upon probable cause, there was no basis for count VI, i.e., malicious prosecution. The circuit court granted the motion as to both counts of the complaint.

Held: Judgment affirmed. The circuit court did not err by dismissing several counts of Candelero's complaint for failing to comply with SG § 12-106 (b)(1). COMAR 25.02.03.01(B), providing that a claim "shall be deemed to have been submitted as of the date it is actually received by the State Treasurer's Office," is not inconsistent with the legislative intent of SG § 12-106(b)(1), requiring that a written claim be submitted "within 1 year after the injury to person or property that is the basis of the claim." Moreover, Candelero's untimely mailing of her claim to the State Treasurer did not amount to substantial compliance thereby satisfying the requirements of SG § 12-106(b)(1).

Also, the circuit court did not err by granting summary judgment on the malicious prosecution claim. That claim requires, in part, a "termination of the proceeding in favor of the plaintiff." Because Candelero was convicted of disobeying the lawful order of a police officer, the outcome of the proceeding was not favorable. As such, the claim failed as a matter of law.

Candelero v. Cole, No. 2052, September 2002, filed September 3, 2003. Opinion by Kenney, J.

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# ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals as of August 26, 2003:

CHARLES F. STEIN, III

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By an Opinion and Order of the Court of Appeals of Maryland dated August 29, 2003, the following attorney has been disbarred from the further practice of law in this State:

JOSEPH PHILIP WEBBER

\*

By an Opinion and Order of the Court of Appeals of Maryland dated August 13, 2003, the following attorney has been indefinitely suspended from the further practice of law in this State:

ROBERT PHILIP THOMPSON

\*

By an Order of the Court of Appeals dated September 4, 2003, the following attorney has been suspended for nine months by consent, effective September 15, 2003, from the further practice of law in this State:

JAMES E. JOYNER

\*

By an Order of the Court of Appeals of Maryland dated September 8, 2003, the following attorney has been suspended for one year, by consent, effective October 8, 2003, from the further practice of law in this State:

MARSDEN SMITH COATES

\*

By an Opinion and Order of the Court of Appeals of Maryland dated September 8, 2003, the following attorney has been disbarred from the further practice of law in this State:

DIANE E. CAFFERTY

\*

By an Order of the Court of Appeals of Maryland dated September 8, 2003, the following attorney has been indefinitely suspended, effective September 12, 2003, from the further practice of law in this State:

MICHELLE JOY HAMILTON  
a/k/a/ Michelle Hamilton Davy

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